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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

EVEREST PROPERTIES II, et al., Plaintiffs and Appellants, v. SANFORD N. DILLER, Defendant and Respondent.	A122641 (San Mateo County Super. Ct. No. CIV 436873)

Plaintiffs are investors in a limited partnership. Defendant Sanford Diller controlled the corporate general partner of their partnership. In a prior trial (hereafter the Prometheus trial) from which Diller was severed, plaintiffs recovered compensatory damages against the general partner for breach of fiduciary duty, but they were denied punitive damages. Following a largely unsuccessful appeal of that judgment, the general partner satisfied it. Diller then moved for judgment on the pleadings, contending plaintiffs could not recover against him because their economic damages had been compensated. Plaintiffs contended they should be permitted to proceed against Diller for recovery of the punitive damages denied against the general partner. The trial court granted judgment to Diller, concluding the "one satisfaction" rule precluded any further proceedings. We affirm, finding plaintiffs' punitive damages claims against Diller barred under the doctrine of collateral estoppel.

I. BACKGROUND

This is the second time this action has come before this court. In a prior nonpublished decision, *Everest Properties II v. Prometheus Development Co.* (Sept. 27,

2007, A114305) (*Prometheus I*), we largely affirmed a money judgment rendered against defendant Prometheus Development Company (Prometheus) for breach of fiduciary duty. As we noted in that decision, the claims against the present respondent, Diller, had been severed prior to trial. Those claims are now before us following a grant of judgment on the pleadings in Diller's favor.

According to the operative pleading, the fourth amended complaint, plaintiffs alleged they were investors in a limited partnership, Prometheus Income Partners, LP (Partnership). Prometheus was the general partner of the Partnership. Diller was the president, chief financial officer, and sole director of Prometheus, and he and his wife, through a trust, were the sole shareholders of the company. As a result, Diller "had complete control of the [Partnership], acting as *de facto* general partner." Further, Prometheus had no separate corporate existence from Diller and was "merely a shell and conduit for Diller in that all of Prometheus's actions have been at the direction of, and in the sole interests of, Diller," who commingled and diverted corporate assets for his personal uses.

The Partnership owned two apartment buildings in Santa Clara. In 2002, Prometheus proposed to the limited partners that an affiliate of Prometheus, PIP Partners (PIP), would purchase their partnership interests. The offered purchase price "was not set by the market, but was simply 'negotiated' between Mr. Diller's 'left hand' and his 'right hand,' " since Diller controlled both the seller, the Partnership, and the buyer, PIP. Because plaintiffs believed PIP's offer was unfair, they secured a more favorable offer from a third party purchaser. Rather than conclude a deal with this purchaser, however, Prometheus sold to PIP at a below-market price.

According to the complaint, the sale to PIP constituted a breach of fiduciary duty to the limited partners, including plaintiffs, by both Prometheus and Diller. As the sole director of the general partner, "Diller had a legal duty to refrain from using his control of Prometheus to cause Prometheus to breach its fiduciary duty to the limited partners." Plaintiffs enumerated at least five specific ways in which defendants had breached their fiduciary duties to the limited partners. In listing these specific acts, they did not

distinguish between the conduct of Diller and Prometheus, labeling the acts "intentional self-dealing by each of the Defendants." As a basis for their request for punitive damages, plaintiffs alleged, "Defendants committed the foregoing acts intentionally and over the objections of Everest and other limited partners. In so doing, Defendants acted with malice and oppression, and their actions were all authorized and/or ratified by an officer, director, and/or managing agent."

Following trial of the claims against Prometheus, the trial court issued a statement of decision that we largely affirmed in *Prometheus I.* The statement found as fact the basic allegations of the complaint, including, "Mr. Diller effectively controlled the Trust [that owned Prometheus], Prometheus, and the Partnership." The court confirmed PIP was also owned exclusively by Diller's family and was controlled by Diller. The court found, "[I]t was Mr. Diller who made the decisions about which the Plaintiffs complained and which provide the basis for the Court's decision against Prometheus. Although two other officers of Prometheus were involved in consummating the Merger, Mr. Diller, as the ultimate 100% owner of Prometheus, the President and Secretary of Prometheus, and the ultimate owner of and person controlling PIP Partners . . . , had complete control of Prometheus and each other party involved in the Merger." In ruling on the merits, the court found Prometheus breached its fiduciary duty to the limited partners in at least 14 different ways, all of them involving unfair manipulation of the Partnership's assets through the sale to PIP.

After an extensive discussion of the theories of damages, the trial court found total damages of nearly $23 million, of which plaintiffs were entitled to a share proportionate to their holdings in the Partnership, plus prejudgment interest. On the issue of punitive damages, the trial court held, "Although breach of fiduciary duty is a species of fraud, Plaintiffs did not meet their burden of showing by clear and convincing evidence that they are entitled to punitive damages from Prometheus." Plaintiffs did not appeal the denial of punitive damages.

Several months after issuance of *Prometheus I*, Diller moved for judgment on the pleadings on the severed claims, arguing the "one judgment" rule precluded any further

litigation against him and imposition of any further damages would result in a double recovery. Plaintiffs opposed, arguing that an alternative measure of compensatory damages would yield a greater recovery and, at a minimum, they should be permitted to pursue punitive damages against Diller. In a supplemental memorandum of law in support of the motion, Diller argued punitive damages were foreclosed by the one satisfaction rule and by the doctrine of collateral estoppel, given the trial court's original finding that the conduct at issue did not satisfy the requirements for punitive damages.

The trial court granted judgment on the pleadings in an extensive written order, concluding that, because the judgment against Prometheus had been paid in full, plaintiffs could not recover any further compensatory damages for their harm and their claim for punitive damages could not exist "separate and apart" from a claim for compensatory damages.

II. DISCUSSION

Plaintiffs acknowledge, as a result of Prometheus's payment of the judgment against it, there are "no remaining recoverable compensatory damages against Diller." They argue, notwithstanding, they should be allowed to pursue their claims against Diller because of the possibility of recovering punitive damages against him. As he did in the trial court, Diller argues the "one satisfaction" rule bars plaintiffs' recovery of both compensatory and punitive damages and, alternatively, the punitive damages claim is barred by collateral estoppel. Because we agree collateral estoppel bars any claim for punitive damages against Diller, we do not reach application of the one satisfaction rule. Although the trial court did not address collateral estoppel, we may affirm on any basis properly presented by the record.[1] (*McClain v. Octagon Plaza, LLC, supra*, 159 Cal.App.4th 784, 802.)

[1] "On appeal, '[w]e do not review the trial court's reasoning, but rather its ruling.' [Citation.] Thus, we may affirm the trial court's ruling 'on any basis presented by the record whether or not relied upon by the trial court.' " (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th at p. 802.)

A. *Collateral Estoppel*

The doctrine of res judicata, defined broadly, prohibits parties from relitigating claims and issues that have already been adjudicated in an earlier proceeding. The doctrine has two components. The first, referred to both as "res judicata" and "claim preclusion," operates as a bar to the maintenance of a second suit between the same parties on the same causes of action. The second, referred to both as "collateral estoppel" and "issue preclusion," does not bar a second action but precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding. (See generally *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 398.) " 'The doctrine [of collateral estoppel] "rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated . . . the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation." ' " (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 717.)

Five specific requirements must be satisfied before collateral estoppel will be applied. " 'First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' " (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.) Once these threshold requirements have been found satisfied, "a court must consider the public policies underlying the collateral estoppel doctrine to determine if the facts of the case merit its application." (*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 694.) " '[I]n deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine

the integrity of the judicial system, or to protect against vexatious litigation.' " (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1508.) Application of the doctrine of collateral estoppel is a question of law subject to de novo review. (*Murphy v. Murphy, supra,* 164 Cal.App.4th at p. 399.)

Four of the five threshold requirements of collateral estoppel are unquestionably present here. The issue of punitive damages arising from Prometheus's conduct was both necessarily and actually decided by the trial court in its written decision after the Prometheus trial, when it expressly rejected the imposition of such damages. That decision was rendered on the merits following a trial and is now final, having been affirmed on appeal. Finally, the plaintiffs, against whom collateral estoppel will be applied, are the same in this action as in the Prometheus trial; indeed, this is the same lawsuit. For purposes of collateral estoppel, it is immaterial that Diller did not participate in the Prometheus trial. (See *Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1688 ["Both California and federal law allow the defensive use of issue preclusion by a party who was a stranger to the first action"].)

B. *Identity of Issues*

The only requirement open to dispute is whether the issue plaintiffs seek to litigate now—their entitlement to punitive damages on the basis of Diller's conduct—is identical to the issue decided by the trial court in the first proceeding—their entitlement to punitive damages on the basis of Prometheus's conduct. " 'Being a matter of *issue* preclusion, collateral estoppel is naturally confined to issues "actually litigated." [Citations.] [¶] A corollary is that the issue decided previously be "identical" with the one sought to be precluded. [Citations.] [¶] Accordingly, where the previous decision rests on a "different factual and legal foundation" than the issue sought to be adjudicated in the case at bar, collateral estoppel effect should be denied.' " (*Johnson v. GlaxoSmithKline, Inc., supra,* 166 Cal.App.4th at p. 1513.) "In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts." (*Hernandez v. City of Pomona, supra,* 46 Cal.4th at p. 511.)

A plaintiff is entitled to punitive damages when he or she proves "by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) " ' " '[A] breach of a fiduciary duty alone without malice**,** fraud or oppression does not permit an award of punitive damages. [Citation.] . . . Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages. . . . Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.' " ' . . . [¶] . . . ' "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton." ' [Citation.]" (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 715–716.)

In denying punitive damages based on Prometheus's conduct, the trial court explained, "Although breach of fiduciary duty is a species of fraud, Plaintiffs did not meet their burden of showing by clear and convincing evidence that they are entitled to punitive damages from Prometheus." In other words, despite the many examples of breach of fiduciary duty by Prometheus, the court decided the conduct did not rise to the level of outrage sufficient to justify the imposition of punitive damages. For purposes of collateral estoppel, the question is whether Diller's conduct differed from Prometheus's conduct in a manner permitting the trial court to find he had behaved outrageously, notwithstanding the contrary finding for Prometheus. In making this determination, we may look at the entire record of the prior proceeding.[2] (*Hernandez v. City of Pomona, supra,* 46 Cal.4th at p. 511.)

[2] While we do not have the entire record from the Prometheus trial before us, the pleadings, the trial court's statement of decision, and our own decision in *Prometheus I* provide a full account of the proceedings with respect to the matters at issue here. (See,

As discussed above, the operative complaint alleged Diller, as president, director, and primary shareholder of Prometheus, had "complete control" of both that entity and the Partnership. It made no distinction between acts committed by Diller and Prometheus, attributing all actionable conduct generally to both defendants. Indeed, the complaint alleged the connection between Prometheus and Diller was so close that Prometheus was "merely a shell and conduit for Diller in that all of Prometheus's actions have been at the direction of, and in the sole interests of, Diller." The conclusions of the trial court following the Prometheus trial confirmed these allegations, the court finding, "Mr. Diller effectively controlled the Trust [that owned Prometheus], Prometheus, and the Partnership" and "it was Mr. Diller who made the decisions about which the Plaintiffs complained and which provide the basis for the Court's decision against Prometheus. . . . Mr. Diller . . . had complete control of Prometheus and each other party involved in the Merger." The 14 examples of breach of fiduciary duty by Prometheus identified by the trial court were all actions directed by, or taken at the behest of Diller, acting in his role as principal of Prometheus.

A corporation is nothing more than a web of legal rights, obligations, and protections spun around a particular set of organized human activities. As innumerable cases have recognized, the corporation, this web of relations, does not itself act; it is the organized human activities that constitute the "actions" of the corporation. (E.g., *Burdette v. Carrier Corp., supra,* 158 Cal.App.4th 1668, 1689 ["As a practical matter, . . . a corporation, is incapable of committing slander, except through one of its employees. '[A] corporation . . . may act only through its officers, agents, and employees' "].) Accordingly, the phrase "the conduct of Prometheus" is a euphemism, a shorthand way of saying, "the conduct of Prometheus's officers and employees while acting on behalf of Prometheus." Because Diller had complete control of Prometheus, the actions he took on behalf of Prometheus *were* the actions of Prometheus, both as a matter of law and fact.

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e.g., *Burdette v. Carrier Corp., supra,* 158 Cal.App.4th 1668, 1690 [affirming finding of collateral estoppel with less than full record of prior proceeding].)

Indeed, the trial court expressly found Diller caused Prometheus to commit the breaches of duty underlying the judgment against it. Accordingly, there was no practical or legal difference between the actions of Diller and those of Prometheus, at least as they relate to breach of the fiduciary duty to plaintiffs. The trial court's conclusion that Prometheus's conduct was not sufficiently outrageous to justify punitive damages was necessarily also a conclusion that Diller's conduct did not justify punitive damages.[3]

This general principle underlies the decision in *Burdette v. Carrier Corp., supra*, 158 Cal.App.4th 1668. In that case, the plaintiff filed a cross-claim in a federal action against Carrier Corp. (Carrier) and one of its officers, alleging he had been defamed by the officer and other unknown Carrier employees. (*Id.* at p. 1688.) During litigation of the federal action, the plaintiff discovered the names of the unknown employees through discovery, but he did not amend the cross-claim to name them. (*Id.* at p. 1690.) The cross-claim was subsequently dismissed on summary judgment as a result of the plaintiff's failure to submit evidence of defamation. The plaintiff thereafter filed a state court action against Carrier, the officer, and the now-identified formerly unknown employees, based on the same allegedly defamatory statements. (*Id.* at pp. 1688–1689.) On appeal following a trial, the unknown employees contended the state claims were barred by collateral estoppel, despite the plaintiff's failure to name them in the federal action. In evaluating the argument, the court began with the premise that a corporation could not act other than through its employees. (*Id.* at p. 1689.) As a result, the court reasoned, "even without the inclusion of the unknown employees as Roe defendants, the federal cross-complaint necessarily included the claim that individual employees were responsible for the defamation. Both actions alleged that employees of Carrier defamed Burdette, and both sought to hold Carrier responsible for the defamatory statements." (*Id.* at p. 1690.) Accordingly, the court held, the state claims against the unknown

[3] This identity of action between Diller and Prometheus is also supported by plaintiffs' alter ego allegations, which contend Diller operated Prometheus solely for his own personal benefit and there was so little distinction between Diller and Prometheus that Diller should be held personally liable for the debts of Prometheus.

employees were barred under the doctrine of collateral estoppel by the federal court's grant of summary judgment on the claims against Carrier based on their conduct. (*Id.* at p. 1691.) In the same way, plaintiffs' claims in the first trial that Prometheus committed acts justifying the imposition of punitive damages "necessarily included" the claim that Diller, as the controlling officer of Prometheus, had committed such acts. The trial court's finding that Prometheus was not liable for punitive damages on the basis of Diller's conduct therefore collaterally estops any finding that Diller himself is liable for punitive damages on the basis of the same conduct.

Significantly, plaintiffs do not identify even a single action in support of the imposition of punitive damages against Diller that was not also argued as a basis for punitive damages against Prometheus. Plaintiffs argue only the trial court could reasonably have concluded punitive damages were not warranted against Prometheus but were still warranted against Diller because "[a]n award of punitive damages depends on several factors including the reprehensibility of the defendant's conduct and the amount necessary to punish the defendant in view of the defendant's financial condition." Both reprehensibility and punishment, however, are generally cited as factors affecting the *amount* of punitive damages awarded, not as factors in the underlying decision to award punitive damages. (E.g., *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1203–1204; *Adams v. Murakami* (1991) 54 Cal.3d 105, 111–112; *County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 545.) As discussed above, the decision whether to award punitive damages is based on the nature of the defendant's conduct, not on the identity of the defendant.[4]

Plaintiffs argue a distinction can be made because Diller, rather than Prometheus, was the ultimate financial beneficiary of the breaches of fiduciary duty. Diller's receipt

[4] Even assuming reprehensibility, as a synonym for outrageousness, is a factor in the decision whether to award punitive damages, it does not change the result here. Because the conduct proven in the second trial will be the same as the conduct proven in the first trial, the court could not reasonably conclude it was more reprehensible the second time around. The nature of the actionable conduct is not altered by a change in the identity of the defendant.

of the benefits, however, was entirely within the scope of the trial court's decision. The 14 separate breaches identified by the trial court were all part of the same general scheme, undertaken by Prometheus and directed by Diller, to benefit Diller personally. The trial court was well aware of this objective. In rendering its decision that Prometheus's conduct did not warrant punitive damages, the trial court necessarily held this type of conduct, designed to result in a direct personal benefit to Diller, did not warrant punitive damages.

The policy considerations underlying collateral estoppel reinforce its application in these circumstances. Plaintiffs have had a full trial at which they had the opportunity to convince a trier of fact they had been victims of conduct justifying the imposition of punitive damages. They failed. They now propose to repeat the same trial solely in an effort to persuade a second trier of fact that punitive damages should be imposed. The argument for punitive damages will not be based on new or different conduct, however, but merely on the presence of a different defendant. Because plaintiffs concede their economic damages have been recompensed, this second trial would have no purpose other than to provide them the classic "second bite at the apple" on the issue of punitive damages. Such a process would waste judicial resources with repetitive litigation and risk the type of inconsistent judgment that would undermine the integrity of the judicial system, precisely the outcomes collateral estoppel is designed to prevent. (See, e.g., *Martorana v. Marlin & Saltzman, supra,* 175 Cal.App.4th at p. 696; *Johnson v. GlaxoSmithKline, Inc., supra,* 166 Cal.App.4th at p. 1508.)

Because we find plaintiffs' claim for punitive damages against Diller to be barred by collateral estoppel, and because plaintiffs concede their claims against him for compensatory damages have been satisfied, we need not reach the issue of application of the one satisfaction rule.

III. DISPOSITION

The judgment of the trial court is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.